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# Supreme Court Reverses Course On Longstanding Antitrust Rule

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# Supreme Court Reverses Course On Longstanding Antitrust Rule

Posted on **December 1, 2007** by **Editor**



**By Marisa N. James**

The U.S. Supreme Court recently issued a surprising decision in the antitrust field that changes the pricing landscape for manufacturers and retailers. For almost 100 years, it has been indisputably illegal for a manufacturer and its distributor to agree to set minimum resale prices. (This is why you often see reference to the “MSRP” or “manufacturer’s *suggested* retail price.”) In the recent case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, however, the Court reversed its position on this issue, instead ruling that the legality of such agreements should be reviewed on a case-by-case basis.

The Sherman Antitrust Act prohibits monopolies and other unreasonable “restraints of trade.” In most cases, whether a particular practice constitutes an unreasonable restraint of trade is judged by the “rule of reason,” which essentially means that the court or jury examines all the circumstances to determine whether a practice is acceptable. However, the courts have determined that some practices are nearly always unfair, so that those practices are necessarily, or *per se*, illegal, and evidence about the circumstances of the practice is immaterial. For example, “cartel” agreements among competing distributors to set minimum prices are *per se* illegal because they almost always tend to restrain the free establishment of prices in the market.

In 1911, the Court considered the case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, which involved a manufacturer of medicines who would only sell to distributors who would agree to sell the medicines at set prices. The Court found that this type of arrangement was *per se* illegal, reasoning that it was analogous to an agreement among the distributors to establish a minimum price.

This rule was in effect for almost 100 years. On June 28, 2007, however, the Court reconsidered the legality of minimum resale price agreements in the *Leegin* case. *Leegin* is the manufacturer of Brighton purses and other leather goods. Respondent PSKS operated a store called Kay’s Closet, which distributed Brighton products. When Kay’s Closet refused to stop discounting

Brighton products, Leegin stopped selling to the store. Kay's Closet then sued Leegin for violation of antitrust laws based on the *Dr. Miles* case.

Writing for the majority (which also included Justices Roberts, Scalia, Thomas, and Alito), Justice Kennedy stated that practices should be considered *per se* illegal "only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." Thus, if the negative economic impact of a practice is not immediately obvious, the *per se* rule should not apply. In the case of minimum resale price agreements, the majority determined that modern economists recognize that these agreements can actually enhance competition. In particular, once retailers can no longer undercut each others' prices, they tend to compete by increasing their levels of service. Also, by guaranteeing the retailers' profit margin, these agreements can promote the entry of new manufacturers into the market by encouraging retailers to invest in a new brand.

Thus, although the majority acknowledged that minimum resale price agreements can also have anticompetitive effects, they determined that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" Therefore, a *per se* rule invalidating the agreements was found to be inappropriate; rather, in the future such agreements will be examined under the "rule of reason," on a case-by-case basis with regard to all of the circumstances of their use.

Notably, the dissenting opinion, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, did not disagree that minimum resale price agreements could promote competition. Rather, the dissenting Justices argued that there had been no change in conditions that justified reversing such a longstanding antitrust rule.

In light of this ruling, this area of the law is likely to experience a period of uncertainty and instability as courts are faced with different fact scenarios and develop corresponding rules and standards for judging whether a particular minimum resale price agreement is an unlawful restraint of trade. Distributors should expect manufacturers to experiment with new pricing guidelines and requirements, but manufacturers should continue to be cautious about instituting price requirements until the law is further developed.

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